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Supreme Court, U. S.
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No. 78-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

SOUTHERN RAILWAY COMPANY, *et al., Petitioners,*

v.

MORGAN YAWN, JR., *et al., Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at —— F.2d ——, and appears in the Appendix at pages 1a-10a. The opinion of the United States District Court for the Northern District of Alabama is not reported, and appears in the Appendix at pages 11a-19a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 16, 1979 (App. p. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Can an employee, by couching a grievance relating to working conditions as a tort claim under the Federal Employers' Liability Act, avoid the procedures mandated by Congress for settling such employee grievances under the Railway Labor Act?

STATUTES INVOLVED

The relevant section of the Railway Labor Act (Act of May 20, 1926, c. 347, § 3, as amended, 45 U.S.C. § 153 First (i)) reads as follows:

> "(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

The relevant section of the Federal Employers' Liability Act (Act of April 22, 1908, c. 149, § 1, 45 U.S.C. § 51) reads as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations,

> shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in the case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

STATEMENT

Respondents, seven clerical workers employed by petitioners at a railroad yard office in Macon, Georgia, fided identical complaints in the Circuit Court for Jefferson County, Alabama, seeking monetary damages under the Federal Employers' Liability Act, 45 U.S.C. § 51. The complaints alleged that by reason of the negligence of petitioners in "failing to provide to the plaintiff reasonable amounts of time for plaintiff to carry out chores and duties of his employment" or "to provide to the plaintiff reasonable and adequate help" or "to provide reasonably safe and suitable work methods," respondents are overworked, are being criticized by their supervisor, and as a result have suffered various mental, emotional and gastrointestinal disturbances.

The cases were removed by petitioners to the United States District Court for the Northern District of Alabama, pursuant to 28 U.S.C. § 1441, on the ground that they were actions arising under the Railway Labor Act. In that court respondents moved to remand the cases

to the state court pursuant to 28 U.S.C. § 1445(a),[1] and petitioners moved to dismiss the actions on the ground that the procedure provided by the Railway Labor Act, 45 U.S.C. § 153 First (i), for the adjustment of grievances is the exclusive remedy for the resolution of respondents' claims, and that respondents should be remitted to that forum for the resolution of their grievances.

The District Court denied the motion without prejudice to the right of respondents to proceed under the grievance procedure and before the Railroad Adjustment Board. In its opinion it noted that terms and conditions of respondents' employment are covered by a collective bargaining contract between petitioners and the Brotherhood of Railway, Airline and Steamship Clerks; that the contract contains a grievance procedure providing that grievances by employees are first to be handled "on the property," and if not resolved in that manner by submission to the National Railroad Adjustment Board in accordance with Section 3 of the Railway Labor Act (45 U.S.C. § 153); and that the grievance procedure is applicable to "An employee who considers himself unjustly treated, otherwise than covered by these rules . . . ." (App. p. 12a). The court then concluded that "the real nature of the plaintiffs' claims arises under the applicable collective bargaining agreement" (App. p. 16a) and that "to allow these employees to proceed with the maintenance of grievance claims in the form of tort actions would undermine the statutory grievance machinery which Congress established by the Railway Labor Act" (App. p. 18a).

[1] That subsection states: "A civil action in any State court against a railroad or its receivers or trustees, arising under sections 51 to 60 of Title 45, may not be removed to any district court of the United States."

On appeal, the Court of Appeals reversed, stating "If an employee can establish physical injury caused by carrier negligence, he is entitled to damages under the FELA" (App. p. 8a). In response to petitioners' contention that the substance, not the form, of the complaint should determine whether the controversy was one within the scope of the procedure of the Railway Labor Act, and that artful pleading of a cause of action under the FELA could not circumvent the grievance procedures mandated by that Act, the court stated (App. p. 8a):

> "We hold that the railroads failed to prove that the employees' allegations of negligence and injury are so baseless as to constitute a fraudulent attempt to evade removal to a federal court."

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is in conflict with the decision of this Court in *Andrews* v. *Louisville & Nashville R. Co.*, 406 U.S. 320 (1972). In that case the Court, expressly overruling its earlier decision in *Moore* v. *Illinois Central R. Co.*, 312 U.S. 630 (1941), stated (at p. 322):

> "Thus, the notion that the grievance and arbitration procedures provided for minor disputes in the Railway Labor Act are optional, to be availed of as the employee or carrier chooses, was never good history and is no longer good law."

The error by the court below lies in its holding that the employee does have an option—that if he chooses to cast his complaint against his employer in the *form*

of an action under FELA, it is irrelevant that he is actually processing a grievance which can and should be resolved under the Railway Labor Act. Assuming that the employee has a grievance, it requires only artful pleading to meet the tests of the court below—that his allegations of negligence and injury are not "so baseless as to constitute a fradulent attempt to evade removal to a federal court" (App. p. 8a), and "If an employee can establish physical injury caused by carrier negligence, he is entitled to damages under the FELA" (*ibid.*). Under *Andrews,* the issue is the substance of the grievance, not "fraud" nor the way the complaint is characterized. In *Andrews,* the Court said (at pp. 323-4):

> "The fact that petitioner characterizes his claim as one for 'wrongful discharge' does not save it from the [Railway Labor] Act's mandatory provisions for the processing of grievances."

If the employee's complaint is in fact a "minor grievance" which the Railway Labor Act mandates for decision pursuant to its procedures, as the District Court found it to be here, couching it as a tort will not avoid that mandate. Nor does the fact that the tort action is based on a statute rather than the common law make inapplicable the emphatic statement in *Gunther* v. *San Diego & Arizona Eastern R. Co.,* 382 U.S. 257, 263 (1965): "This Court time and again has emphasized and reemphasized that Congress intended minor grievances of railroad workers to be decided finally by the Railroad Adjustment Board." *Cf. Railway Labor Executives Ass'n* v. *Atchison, Topeka & Santa Fe R. Co.,* 430 F.2d 994 (9th Cir. 1970), *certiorari denied,* 400 U.S. 1021 (suit based on Interstate Commerce Act); *Dorsey* v. *Chesapeake & Ohio R. Co.,* 476 F.2d 243 (4th Cir. 1973) (claim based on Constitution); *Slagley* v. *Illinois Central R. Co.,* 397 F.2d 546 (7th Cir. 1968) (same). Only if the complaint bears no relation to the terms and conditions of the employer-employee relationship and to the collective bargaining contract is removal to the federal courts improper. *Cf. Farmer* v. *United Brotherhood of Carpenters and Joiners,* 430 U.S. 290 (1977).

In this case there is a collective bargaining contract which accords these employees the right to complain of the treatment alleged in the complaints.[2] The contract expressly provides that it is applicable to "An employee who considers himself unjustly treated, otherwise than covered by these rules . . ." (App. p. 22a). If substance rather than form be considered, the claim is a typical minor grievance, which Congress has said shall be settled by arbitration by the Adjustment Board if it cannot be resolved "on the property." To permit such a grievance to be litigated in the state courts would thwart the procedure which is designed to be "a mandatory, exclusive and comprehensive system for resolving grievance disputes." *Brotherhood of Locomotive Engineers* v. *Louisville & Nashville R.R.,* 373 U.S. 33, 38 (1963). That it may be possible, as it may often be, to state a grievance as a cause of action under FELA is irrelevant.

2. The decision is also in conflict with the decisions of other Courts of Appeals. In *Magnuson* v. *Burlington Northern, Inc.,* 576 F.2d 1367 (9th Cir. 1978), *certi-*

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[2] Rule C-2 of the collective bargaining contract covering respondents' employment is set out in the Appendix, p. 22a.

orari denied, 58 L.Ed.2d 323, an employee was discharged following an investigation which led the railroad to conclude that he had been responsible for a serious accident. The employee thereafter sued the railroad and its officials in the state court claiming that he was the victim of a conspiracy to cover up the railroad's and the officials' negligence and sought recovery for emotional distress. The Ninth Circuit Court of Appeals, in sustaining removal of the case to the federal court, pointed out that "Artful pleading cannot conceal the reality that the grievance of the complaint is wrongful discharge" (576 F.2d at 1369), and held that the employee's claim was in fact a "minor dispute" as to which the Railway Labor Act was the exclusive remedy. It added (*ibid*):

> "If the pleading of emotional injury permitted aggrieved employees to avoid the impact of the RLA, the congressional purpose of providing a comprehensive federal scheme for the settlement of employer-employee disputes in the railroad industry, without resort to the courts, would be thwarted."

Here the action by the employees cannot be isolated from the underlying labor dispute involving the elimination of jobs, and, as in *Magnuson,* is based on "a matrix of facts which are inextricably intertwined with the grievance machinery of the collective bargaining agreement and of the R.L.A." (576 F.2d at 1369). Under similar circumstances, other courts have reached similar results. *Sanchez* v. *Eastern Airlines,* 574 F.2d 29, 32 (1st Cir. 1978) (alleged tortious denial of disability pension: "No federal or state court has jurisdiction over the merits of any employment dispute subject to determination by a system board of adjustment").

Railway Labor Executives Ass'n v. *Atchison, Topeka & Santa Fe R. Co.,* 430 F.2d 994, 997 (9th Cir. 1970), *certiorari denied,* 400 U.S. 1021 (tort action for damages from alleged illegal train discontinuance; "The employees seek to characterize this action as a 'tort action' for violation of a statutory duty and, therefore, not referrable to the Adjustment Board. But the provisions of the Railway Labor Act relate to matters of substance and not form"). See also cases cited at pages 6-7, *supra.*

CONCLUSION

The legislative policy embodied in the Railway Labor Act—that employment disputes in the railroad industry are to be settled by arbitration and not in the courts—is seriously jeopardized by the decision below, which supersedes that policy whenever a grievant chooses to frame his complaint in terms of tort. The Court should not sanction a complete reversal of the priority accorded to the procedures of the Railway Labor Act by Congress and by this Court. The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

MORGAN YAWN, JR., *et al.*, *Plaintiffs-Appellants*,

v.

SOUTHERN RAILWAY COMPANY, etc., *et al.*,
Defendants-Appellees.

Nos. 77-1036 thru 77-1042.

United States Court of Appeals,
Fifth Circuit.

March 16, 1979.

Appeals from the United States District Court for the Northern District of Alabama.

Before MORGAN, RONEY and VANCE, Circuit Judges.

LEWIS R. MORGAN, Circuit Judge:

[1] Appellants, seven clerical employees of the appellee railroad companies, filed companion lawsuits under the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq., in an Alabama state court seeking to recover damages for personal injuries allegedly resulting from the railroads' negligence. In identical complaints, the employees claimed that the railroads negligently failed to provide them with adequate help and adequate time with which to do their jobs thereby causing them to suffer physical pain, mental anguish, and gastrointestinal disturbances. The railroads moved to federal court on the ground that the employees' claims were in reality "minor" disputes arising under the Railway Labor Act, 45 U.S.C. § 151 et seq., and therefore subject to that Act's grievance and arbitration procedures. The parties' positions were extensively briefed and orally argued before the district court on October 21, 1976. Reasoning that the employees had cast what were clearly grievance claims in the form of FELA cases in order to avoid

the grievance procedure and the National Railroad Adjustment Board, the district court denied the employees' motions to remand to state court and granted the railroads' motions to dismiss the suits without prejudice to the employees' rights to pursue their remedies under the procedures established by the Railway Labor Act. The issue on this appeal is whether the district court erred in failing to grant the employees' motions to remand to state court. Because FELA suits filed in state courts are nonremovable under 28 U.S.C. § 1445(a), we conclude that the case must be remanded.

[2] The primary purpose of the Railway Labor Act is "to avoid any interruption to commerce or to the operation of any carrier engaged therein" by promoting industrial peace and eliminating, as far as possible, the danger of strikes on railroads. 45 U.S.C. § 151a; *Virginian Ry. v. System Federation No. 40,* 300 U.S. 515, 547, 57 S.Ct. 592, 81 L.Ed 789 (1937); *International Ass'n. of Machinists v. Central Airlines, Inc.,* 295 F.2d 209 (5th Cir. 1961). Toward this end, the Act establishes a grievance and arbitration procedure providing for "the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or *working conditions.*" 45 U.S.C. § 151a (emphasis added). The Supreme Court has stated that "this statutory grievance procedure is a mandatory, exclusive, and comprehensive system for resolving grievance disputes." *Brotherhood of Locomotive Engineers v. Louisville & N. R.R.,* 373 U.S. 33, 38, 83 S.Ct. 1059, 1062, 10 L.Ed. 2d 172 (1963). *See Andrews v. Louisville & N. R.R.,* 406 U.S. 320, 92 S.Ct. 1562, 32 L.Ed.2d 95 (1972).

The railroads contend that the employees attempted to circumvent this mandatory procedure by the artful pleading of a FELA action. They urge that the district court was not required to accept the employees' characterization of their claims but was entitled to examine the facts of the

case in making its assessment as to the "real nature" of the claims. *Villarreal v. Brown Express,* 529 F.2d 1219 (5th Cir. 1976); *Universal Communications Corp. v. Burns,* 449 F.2d 691 (5th Cir. 1971). In support of its position that these FELA claims were a mere ruse designed to avoid the grievance procedures and the National Railroad Adjustment Board, the railroads point out that these claims arose out of the elimination of certain jobs and are nothing more than an assertion by the employees that they are being required to work too hard. Such claims, they argue, are classic "minor" disputes over working conditions which must be submitted to the Act's mandatory grievance and arbitration procedures.

The employees deny that they artfully pleaded a nonremovable cause of action in order to avoid the grievance and arbitration procedures of the Railway Labor Act. On the contrary, they assert that their allegations of negligence and personal injury state substantial causes of action under the Federal Employers' Liability Act and, for that reason, cannot be removed to federal court. *See* 28 U.S.C. § 1445(a).

[3, 4] Section 1 of the Federal Employers' Liability Act, 45 U.S.C. § 51, establishes a railroad's liability of negligent injury to its employee:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery,

track, roadbed, works, boats, wharves, or other equipment.

The Act does not propose to define negligence, but rather leaves that task to the common law as announced by the federal courts. *Urie v. Thompson,* 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949); *Escandon v. Pan American Foreign Corp.,* 88 F.2d 276, 277 (5th Cir. 1937). In deciding questions of negligence, the courts have uniformly recognized that a railroad is under a nondelegable duty to provide its employees with a reasonably safe place to work. *Nivens v. St. Louis S.W. Ry.,* 425 F.2d 114 (5th Cir. 1970); *Fort Worth & D. Ry. v. Smith,* 206 F.2d 667 (5th Cir. 1953). As a corollary to this duty to maintain safe working conditions, the carrier is required to provide its employee with sufficient help in the performance of the work assigned to him. *Blair* v. *Baltimore & O. R.R.,* 323 U.S. 600, 65 S.Ct. 545, 89 L.Ed. 557 (1945). Where the failure to provide sufficient help proximately causes injury to the employee, the carrier is liable for negligence under the provisions of the FELA. *Deere* v. *Southern Pac. Co.,* 123 F.2d 438 (9th Cir. 1941), *cert. denied,* 315 U.S. 819, 62 S.Ct. 916, 86 L.Ed. 1217 (1942); *Reynolds v. Atlantic Coast Line R.,* 251 Ala. 27, 36 So.2d 102 (1948); *Louisville & N. R.R. v. Crim,* 273 Ala. 114, 136 So.2d 190 (1961).

The employees rely on the above principles as providing a basis for carrier liability in this case should they prove their allegations of negligence and injury. The overwhelming majority of the "insufficient help" cases, however, concern employees who suffered some demonstrable physical injury, usually a back injury sustained while attempting to lift too heavy an object. *Southern Ry. v. Welch,* 247 F.2d 340 (6th Cir. 1957) (ruptured disc sustained when moving rails); *Masiglowa v. New York, C. & St. L. R.R.,* 135 F.Supp. 816 (N.D. Ohio 1955) (back injury sustained while lifting planks); *Missouri Pac. R.R. v. Sparks,* 424 S.W.2d 12 (Tex.Civ.App. 1967) (hernia sustained while

moving mail bag). The employees cite only one FELA case in which the plaintiff's injury was the type of borderline mental-physical injury alleged in this case. *McMillan v. Western Pacific R.R.,* 54 Cal.2d 841, 9 Cal.Rptr. 361, 357 P.2d 449 (1960). There the employee, a train dispatcher, alleged that his employer's negligence in subjecting him to working conditions involving clerical functions of unusual responsibility imposed such stress on his physical and nervous systems that he suffered a severe nervous collapse. The only question before the court was whether the complaint stated a cause of action under the FELA. The court held that these allegations were "clearly sufficient" to state a cause of action for injuries resulting from the railroad's negligence.

In *Urie v. Thompson,* 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949), the Supreme Court held that the FELA should be liberally construed as covering "any injury" caused by the carrier's negligence, including injuries attributable to the employees' working conditions:

> We recognize, of course, that when the statute was enacted, Congress' attention was focused primarily upon injuries and death resulting from accidents on interstate railroads. Obviously these were the major causes of injury and death resulting from railroad operations. But accidental injuries were not the only ones likely to occur. And *nothing in either the language or the legislative history discloses expressly any intent to exclude from the Act's coverage any injury resulting "in whole or in part from the negligence" of the carrier.* If such an intent can be found, it must be read into the Act by sheer inference.
>
> The language is as broad as could be framed: "any person suffering injury while he is employed"; "such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier"; "by reason of any defect or insuf-

ficiency, due to its negligence, in its cars, engines, appliances," etc. On its face, *every injury suffered by any employee* while employed by reason of the carrier's negligence *was made compensable. The wording was not restrictive as to* the employees covered; *the cause of injury,* except that it must constitute negligence attributable to the carrier; *or the particular kind of injury resulting.*

To read into this all-inclusive wording a restriction as to the kinds of employees covered, the degree of negligence required, or *the particular sorts of harm inflicted, would be contradictory to the wording, the remedial and humanitarian purpose, and the constant and established course of liberal construction of the Act followed by this Court.*

337 U.S. at 181-82, 69 S.Ct. at 1030 (emphasis added). We need not consider at this time whether *Urie* is persuasive authority in support of these employees' argument that the allegations of their complaints state a cause of action under the FELA. As we explain below, the initial resolution of this question is entrusted to the Alabama state court where these suits were originally filed.

[5, 6] These cases were removed to federal court pursuant to 28 U.S.C. § 1441 on the ground that they are actions arising under the Railway Labor Act. In accepting the railroads' argument that these claims were in essence minor disputes which the employees must submit to the prescribed grievance and arbitration procedures, the district court did not discuss or cite the statute expressly prohibiting the removal of FELA suits to federal court. That statute provides as follows:

> A civil action in any State court against a railroad or its receivers or trustees, arising under sections 51 to 60 of Title 45, may not be removed to any district court of the United States.

28 U.S.C. § 1445(a). We think that the language of this statute and the applicable case law require that these cases be remanded to the Alabama state court.

"Congress has unequivocally declared that in FELA suits filed in state courts, the federal courts are without jurisdiction to proceed in the matter until the cause has run its course at the state level." *Gamble v. Central of Ga. Ry.*, 486 F.2d 781 (5th Cir. 1973). The initial question is whether the prohibition against removal found in section 1445(a) applies when the defendant asserts that the complaint fails to state a cause of action under the FELA. We think that it does. *See Smith v. Camas Prairie Ry.*, 216 F. 799 (D.C.Idaho 1914), cited by this court in *Porter v. St. Louis-San Francisco Ry.*, 354 F.2d 840, 844 (5th Cir. 1966). Consequently, a defendant who asserts that the state court erred in assessing the sufficiency of the FELA complaint cannot, for that reason, remove the suit but must pursue his arguments through state court channels before appealing to the federal courts for relief. However, where the allegations of the complaint are made in a fraudulent attempt to evade removal, the case is removable and should not be remanded to state court. *Great Northern Ry. v. Alexander,* 246 U.S. 276, 38 S.Ct. 237, 62 L.Ed. 713 (1918); *Boyle v. Chicago, R.I. & P. Ry.*, 42 F.2d 633, 634 (8th Cir. 1920). ("[T]he federal court has a right and a duty to determine the issue of fraudulent statement where such is presented, and, if that statement is properly sustained, the jurisdiction attaches."). The burden of proving that the allegations of the complaint were fraudulently made is on the party seeking to remove the FELA suit, and any doubts should be resolved in favor of the plaintiff. *Boyle, supra,* 42 F.2d at 635; *Farmers Bank & Trust Co. v. Atchison T. & S.F. Ry.*, 25 F.2d 23 (8th Cir. 1928).

[7] The railroads assert that these employees artfully pleaded a FELA cause of action in order to avoid the grievance procedures mandated by the Railway Labor Act. However, the mere assertion of fraud is not sufficient to warrant removing the case to federal court. Moreover, the assertion that the provisions of the Railway Labor Act relate to matters of substance and not form cannot obscure the fact that the "substance" of these complaints is an action alleging physical injury caused by the railroads' negligence. "The Railway Labor Act . . . has no application to a claim for damages to the employee resulting from the negligence of an employer railroad." *Barnes v. Public Belt R.R. Comm'n.*, 101 F.Supp. 200 (E.D.La. 1951). We hold that the railroads failed to prove that the employees' allegations of negligence and injury are so baseless as to constitute a fraudulent attempt to evade removal to federal court.

[8] The basic theme of the railroads' argument is that since the employees' claims are in essence a minor dispute over working conditions, they must be submitted to grievance procedure resolution. Although the "Adjustment Board is an expert body designed to settle 'minor' disputes that arise from day to day in the railroad industry," *Diamond v. Terminal Railway Alabama State Docks,* 421 F.2d 228, 233 (5th Cir. 1970), the Board is not entrusted with the function of resolving personal injury claims. If an employee can establish physical injury caused by carrier negligence, he is entitled to damages under the FELA. Any allegations of railroad negligence in failing to provide an employee with sufficient help could be characterized as a dispute over working conditions. However, the fact that an employee suffers injury because of unsafe working conditions does not preclude access to the FELA. Thus, if an employee engaged in repairing tracks is injured because he was furnished insufficient help to perform the task, the

railroad will not be heard to argue that the employees' FELA suit is removable because it concerns a dispute over working conditions. *See generally* the "insufficient help" cases cited above. The fact that these employees did not claim to have suffered a back injury but alleged a less substantial physical injury does not require a different result in this case.

Furthermore, the Supreme Court's decision in *Andrews v. Louisiana & N. R.R.*, 406 U.S. 320, 92 S.Ct. 1562, 32 L.Ed.2d 95 (1971), cited by the railroads, is not inconsistent with our holding. In that case a railroad worker sought damages in state court for "wrongful discharge," alleging that following an automobile accident the railroad refused to allow him to return to work despite the fact that he had fully recovered from his injuries. After removal by the railroad, the district court dismissed the complaint because of the failure to exhaust his administrative remedies under the Railway Labor Act. This court affirmed at 441 F.2d 1222 (5th Cir. 1971). In affirming our decision, the Supreme Court overruled *Moore v. Illinois Central R.R.*, 312 U.S. 630, 61 S.Ct. 754, 85 L.Ed. 410 (1941), which held that an employee alleging wrongful discharge could elect to proceed under the Railway Labor Act or sue in state court for breach of contract. The Court held that "the notion that the grievance and arbitration procedures provided for minor disputes in the Railway Labor Act are optional . . . was never good history and is no longer good law." *Andrews, supra,* 406 U.S. at 322, 92 S.Ct. at 1564. However, in *Andrews,* unlike the present case, the employee's right to sue for wrongful discharge stemmed entirely from the collective bargaining agreement and the provisions of the Railway Labor Act:

> Here it is conceded by all that the only source of petitioner's right not to be discharged, and therefore to treat an alleged discharge as a "wrongful" one that

> entitles him to damages, is the collective-bargaining agreement between the employer and the union.

406 U.S. at 324, 92 S.Ct. at 1565. The source of these employees' right not to be negligently injured is not found in the collective bargaining agreement but derives from an express statutory provision designed to provide employees a means of compensation for on-the-job injuries resulting in whole or in part from the railroad's negligence. The principles articulated in *Andrews* do not require removal in this case.

The judgment of the district court refusing to remand the cases to the Circuit Court for the Tenth Judicial Circuit of Alabama is reversed with directions that the cause be remanded.

REVERSED and REMANDED.

JUDGMENT

These causes came on to be heard on the transcripts of the record from the United States District Court for the Northern District of Alabama, and were argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the said District Court in these causes be, and the same are hereby, reversed; and that these causes be, and the same are hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that the defendants-appellees pay to the plaintiffs-appellants the costs on appeal, to be taxed by the Clerk of this Court.

March 16, 1979

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

Memorandum Opinion

(Number and title omitted) (Filed: November 9, 1976)

A. Introduction:

This case is one of seven companion lawsuits filed by clerical employees at a railroad yard office in Macon, Georgia. Since the only difference among them is the names of the plaintiff. this opinion will apply to all of the cases.[1]

The cases were filed in the Circuit Court for Jefferson County, Alabama and were removed pursuant to 28 U.S.C. § 1441 on the ground that they are actions arising under the Railway Labor Act (45 U.S.C. § 151 et seq). The Court has before it the following motions:

(1) Plaintiff's motion to remand to State Court on the ground that the cases are non-removable suits under the Federal Employers Liability Act (45 U.S.C. § 51 et seq).

(2) Defendants' motion to dismiss on the ground that the grievance procedure and the National Railroad Adjustment Board[2] are the exclusive forum for the resolution of

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[1] The other cases are Homer A. Whitby, Jr. v. Southern Railway Co., Civil Action No. 75-M-2226-S; J. T. Chapman v. Southern Railway Co., Civil Action No. 75-M-2227-S; Ronald K. Walker, Sr. v. Southern Railway Co., Civil Action No. 75-M-2228-S; Leroy T. Foster v. Southern Railway Co., Civil Action No. 75-M-2229-S; Robert A. Moore v. Southern Railway Co., Civil Action No. 75-M-2230-S; and W. F. Wilder v. Southern Railway Co., Civil Action No. 75-M-2231-S.

[2] Or a special board of adjustment (also sometimes called a public law board) established pursuant to 45 U.S.C. § 153 Second. When this opinion refers to the National Railroad Adjustment Board, it should be understood as also referring to a special board of adjustment as an alternative arbitral forum under the Railway Labor Act.

the plaintiffs' claim in accordance with Section 3 of the Railway Labor Act (45 U.S.C. § 153).

(3) Defendants' motion to consolidate the cases.

Following the submission of exhaustive briefs, the Court heard oral argument on October 21, 1976.

B. Facts:

The relevant facts are the following:

1. The terms and conditions of the plaintiffs' employment are governed by a collective bargaining agreement between the plaintiffs' employer and the Brotherhood of Railway, Airline & Steamship Clerks.

2. The collective bargainin agreement contains a grievance procedure which provides that grievances by employees are first to be handled "on the property", and if not resolved in that manner, by submission to the National Railroad Adjustment Board in accordance with Section 3 of the Railway Labor Act. The grievance procedure further provides that it is applicable to "An employee who considers himself unjustly treated, otherwise than covered by these rules—."

3. Each of the seven plaintiffs alleges, through complaints which are identical except for the names of the plaintiffs, that as a result of the elimination of several jobs, they are being given too much work to do, are being rushed in the performance of their jobs, are given inadequate time and help to perform their jobs, and are being subjected to criticism by their supervisor and that as a consequence, they have been caused to suffer various forms of mental, emotional, and gastrointentinal disturbances. They seek monetary compensation under the FELA for the defendants' alleged negligence in subjecting them to these conditions.

4. The plaintiffs have not invoked the grievance procedure of the collective bargaining agreement with respect to their claims.

C. Analysis:

At the outset, the Court is faced with settled principles on both sides of the question. On the one hand, the plaintiffs correctly point out that the FELA is to be liberally construed to protect the rights of injured railroad workers and that it provides a cause of action for injuries resulting from negligence in connection with working conditions. *Urie v. Thompson*, 337 U.S. 163 (1949); *McMillan v. Western Pacific R. Co.* 54 Cal. 2d 841, 357 P. 2d 449 (1960). On the other hand, it is established law that "The federal policy favoring arbitration of labor disputes is firmly grounded in Congressional command", *Gateway Coal Co. v. United Mine Workers*, 370 U.S. 368 (1974), that this policy applies with particular force to the statutory grievance procedure established by Congress in the Railway Labor Act, *Andrews v. Louisville & Nashville R. Co.*, 406 U. S. 320 (1972), and that doubts should be resolved in favor of resolution through the grievance and arbitration procedure. *Haynes v. United States Pipe & Foundry Co.*, 362 F. 2d 414 (5th Cir. 1966); *Boone v. Armstrong Cork Co.*, 384 F. 2d 285 (5th Cir. 1967).

The question, then, is whether these cases are in actuality FELA lawsuits which the defendants are seeking to transform into grievance claims, or grievance claims which the plaintiffs have cast in the form of FELA cases to avoid the grievance procedure and the National Railroad Adjustment Board.

The question is to be answered by determining the substance or real nature of the plaintiffs' case. It is settled that an action may be removed where the real nature of the claim is removable, although it may have been cast in the form of a non-removable complaint. E.g., *Universal*

Communications Corp. v. Burns, 449 F. 2d 691 (5th Cir. 1971); *Clinton v. Hueston,* 308 F.2d 908 (5th Cir. 1962). See also 1A *Moore's Federal Practice* ¶ 0.160, pages 185-188 (2nd ed. 1974); 2 *Cyclopedia of Federal Procedure* § 3.39, page 248 (1965); 14 Wright & Miller, *Federal Practice and Procedure* § 3734, pages 736-739 (1975). It is equally settled that where the real nature of an employee's claim is subject to resolution under the grievance and arbitration procedure of a collective bargaining agreement covered by the Labor-Management Relations Act or the Railway Labor Act, it must be resolved through that procedure, although cast in the form of a non-grievance legal action. E.g., *Railway Labor Executive Ass'n v. Atchison, Topeka & Santa Fe R. Co.,* 430 F. 2d 994 (9th Cir. 1970), cert. denied, 400 U.S. 1021 (1971); *Slagley v. Illinois Central R. Co.,* 397 F. 2d 546 (7th Cir. 1968).

Accordingly, the inquiry which is determinative of both the motion to remand and the motion to dismiss is the real nature of the plaintiffs' claim. The points which are relevant in the resolution of this issue are the following:

1. *Effect of the plaintiffs' characterization of their claims:* The initial question is whether the plaintiffs' characterization of their claims must determine the proper forum for their resolution. The seven complaints assert FELA claims without reference to any provision of the collective bargaining agreement. However, the form in which a claim is cast for purposes of a lawsuit cannot be conclusive of the matter. Instead, it is established law that the Court has the responsibility of determining the real nature of the claim. As the Fifth Circuit has said, "The complex regulatory scheme of federal labor law may not be avoided by merely artful pleading of a state cause of action." *Universal Communications Corp. v. Burns,* supra.

2. *Contention that the principle requiring grievance procedure resolution should not be applied when the plaintiff sues under the FELA:*

The plaintiffs could not and do not question the principle which requires that arbitrable claims be resolved through the grievance and arbitration procedure. They similarly do not question the fact that the Courts have applied the real nature of the claim principle to find that lawsuits based on a tort theory were in reality claims subject to grievance procedure resolution. E.g., *Railway Labor Executives Ass'n v. Atchison, Topeka & Santa Fe R. Co.,* supra. However, they urge that the present cases are different because the employees here are suing under the FELA. This contention cannot be accepted for the following reasons.

First, the application of the principle that arbitrable claims are to be resolved through the grievance and arbitration procedure cannot logically be fragmented into cases in which the employee sues on a common law theory and cases in which the employee sues on the basis of a statute. Moreover, the decisions applying this principle have included cases in which the employee's lawsuit was based on a statute or constitution. E.g., *Railway Labor Executives Ass'n v. Atchison, Topeka & Santa Fe R. Co.,* supra; *Slagley v. Illinois Central R. Co.,* supra; *Dorsey v. Chesapeake & Ohio R. Co.,* 476 F. 2d 243 (4th Cir. 1973).

Second, the plaintiffs' contention would create the anomalous result that the principle requiring grievance procedure resolution would be applicable to all workers in industries affecting commerce with the exception of railroad workers, who would have the option of processing grievance claims under the grievance procedure established by the Railway Labor Act or of casting them in the form of a tort action and filing suit under the FELA. Such a result would not only be illogical but would as well be contrary to the Supreme Court's emphatic statement that "This Court time and again has emphasized and re-emphasized that Congress intended minor grievances of railroad workers to be decided finally by the Railroad Adjustment Board."

Gunther v. San Diego & Arizona Eastern R. Co., 382 U.S. 257 (1965). The plaintiffs' contention would further create the inconsistent situation that some railroad workers could continue to utilize the arbitration procedure under the Railway Labor Act for the resolution of grievance claims, while other railroad workers with the same or similar claims could avoid arbitration by calling their claims "tort actions" under the FELA. To sanction this potential result would be directly contrary to the policy, as expressed by the Supreme Court, that "The Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon. Long and varied experiences have added to the Board's initial qualifications. Precedents established by it, while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway systems." *Slocum v. Delaware, Lackawanna & Western R. Co.*, 339 U.S. 239 (1950).

(3) *Facts of these cases:* In the final analysis, the question of what is the real nature of a claim must turn on the facts of the case. In the context of the particular facts of these cases, the Court finds that the real nature of the plaintiffs' claims arises under the applicable collective bargaining agreement and that the remedy available to the plaintiffs is arbitration under the procedures established by the Railway Labor Act. The claims arose out of the elimination of jobs and in essence consist of the complaint that plaintiffs are being required to work too hard. This is precisely the type of labor-management dispute that is eminently susceptible to resolution by the National Railroad Adjustment Board, which can apply its familiarity "with the thorny problems and the whole range of grievances that constantly exist in the railroad world." *Gunther v. San Diego & Arizona Eastern R. Co.*, supra. Conversely, it would be inappropriate to have a jury decide the underlying questions regarding the circumstances of the job elimination and the amount of work which these employees are required to perform.

Similarly, the circumstance that each of the seven plaintiffs alleges he has sustained the identical mental, emotional, and gastrointestinal disturbances does not require the Court to treat their claims as tort actions under the FELA. Every employee who believes he has a legitimate grievance will doubtless have some mental or emotional or gastrointestinal upset occasioned by his belief that he has been wronged, and if the pleading of such upsets could enable the employee to avoid the grievance and arbitration procedure, the principle of exclusive arbitration resolution established by Congress and the Courts would be substantially undermined.

In sum, the Court finds that in these cases, as in the Ninth Circuit's decision in *Railway Labor Executives Ass'n v. Atchison, Topeka & Santa Fe R. Co.*, supra, "The employees seek to characterize this action as a 'tort action' for violation of a statutory duty and, therefore, not referrable to the Adjustment Board. But the provisions of the Railway Labor Act relate to matters of substance, not form."

(4) *Contention that the application of the principle requiring grievance procedure resolution would nullify the FELA:* The plaintiffs argue that the application of the principle requiring grievance procedure resolution would allow the Federal Employers Liability Act to be nullified by the Railway Labor Act. That is not an accurate assessment of the matter.

To begin with, the finding that the plaintiffs' claims are in reality grievances subject to grievance procedure resolution is based on the facts of these cases and does not establish a precedent for future cases having different facts.

Moreover, contrary to the plaintiffs' argument, it is clear that to allow these employees to proceed with the maintenance of grievance claims in the form of tort actions would undermine the statutory grievance machinery which Congress established by the Railway Labor Act. That Act is a carefully considered means of achieving industrial peace on the railroads, vital to the needs of interstate commerce. An important part of the pattern established by the Act is the arbitration procedure. As the Supreme Court has said, "The purpose of the Railway Labor Act was to provide a framework for peaceful settlement of labor disputes between carriers and their employees to 'insure to the public continuity and efficiency of interstate transportation service, and to protect the public from the injuries and losses consequent upon any impairment or interruption of interstate commerce through failures of managers and employees to settle peaceably their controversies.' " *Union Pacific R. Co. v. Price,* 360 U.S. 601 (1959). To permit aggrieved employees to bypass the arbitration procedure in these cases and resort to the courts by pleading their grievances in the form of FELA complaints would break the statutory pattern, subvert the prescribed arbitration remedy, and threaten the industrial peace which the Railway Labor Act was designed to achieve.

(5) Adequacy of relief: The plaintiffs' final contention is that while they could pursue their claims regarding their working conditions through the grievance procedure and before the National Railroad Adjustment Board, they could not obtain adequate relief from the Adjustment Board. The conclusive answer is that an employee's opinion as to the adequacy of the relief he predicts he will receive through the grievance and arbitration procedure cannot preclude the application of the strong Federal policy favoring the resolution of arbitrable claims through the grievance and arbitration procedure or of the legal principle that the remedy of arbitration provided under the Railway Labor Act for claims arising under railroad labor agreements is exclusive. *Andrews v. Louisville & Nashville R. Co., supra; Republic Steel Corp. v. Maddox,* 379 U.S. 650 (1965).[3]

D. Conclusion:

The parties are in agreement that if the real nature of the plaintiffs' claims is determined to be subject to grievance procedure resolution, the cases were properly removed and are due to be dismissed. Since the Court has found that the real nature of the plaintiffs' claims is subject to resolution through the grievance procedure and the National Railroad Adjustment Board as provided in the Railway Labor Act, the plaintiffs' motion to remand will be overruled and the defendants' motion to dismiss will be granted, without prejudice to the plaintiffs' rights to pursue their remedies under the grievance procedure and before the National Railroad Adjustment Board. In view of these rulings, the motion to consolidate the cases is moot.

It should be reiterated that the Court's rulings are based on the particular facts of the present cases and should not be regarded as necessarily applicable to other cases having their own, different factual situations.

DONE, this the 30th day of November, 1976.

/s/ FRANK H. MCFADDEN
Chief Judge

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[3] It might also be noted that relief is afforded for claimed lost wages due to sickness under the Railroad Unemployment Insurance Act (45 U.S.C. 351-367) and that if a sickness is permanently disabling, annuities may be available under the Railroad Retirement Act (45 U.S.C. 231).

Final Judgment

(Number and title omitted) (Filed: December 1, 1976)

For the reasons set forth in the Memorandum Opinion entered contemporaneously herewith in this cause, it is by the Court ORDERED, ADJUDGED and DECREED as follows:

1. The plaintiff's motion to remand this case to the Circuit Court of Jefferson County, Alabama be and the same is hereby overruled.

2. The defendants' motion to dismiss be and the same is hereby granted, with prejudice to the refiling of this action but without prejudice to the plaintiff's right to pursue the remedies available under the grievance procedure and before the National Railroad Adjustment Board.

3. The defendants' motion to consolidate be and the same is hereby overruled.

4. Costs are taxed to the plaintiff.

DONE, this the 30th day of November, 1976.

/s/ FRANK H. MCFADDEN ..
Chief Judge

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Notice of Appeal

(Number and title omitted) (Filed: December 22, 1976)

Notice is hereby given that the above named plaintiff hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgments entered in these actions on the 30th day of November, 1976.

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By: /s/ MICHAEL A. FLORIE

Michael A. Florie, for Plaintiff

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NOTE: Portion of Record Omitted, Filed In Its Original Form

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Rule C-2—Grievances

An employee who considers himself unjustly treated, otherwise than covered by these rules, shall have the same right of investigation, hearing, appeal and representation as provided in Rule C-1 if written request which sets forth the employee's complaint is made to his immediate superior officer and/or the designated officer with whom claims are filed, within thirty (30) days of cause of complaint.

NOTE: This rule should be used particularly in instances where an employee is adjudged not to have relatively equal or sufficient qualifications, merit and capacity for a position on which he has submitted an application or bid and a junior employee has been assigned or awarded the position. The employee must then present evidence at the hearing that he did have relatively equal or sufficient qualifications, merit and capacity and the burden of proof rests with such employee. In the event the employee had previously filled the position for thirty (30) or more work days during a vacancy or during a vacation period and had not previously been disqualified therefrom, the burden of proof would then shift to the carrier to prove such employee did not have relatively equal or sufficient qualifications, merit and capacity.

This rule is not limited solely to cases of the type cited above, but may be used in any case where an employee feels he has been unjustly treated in some manner not covered by any specific rule(s) of this agreement.